GROUP1001

November 28, 2023
Submitted via e-mail: rule-comments@sec.gov
7 Pages

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F. Street NE
Washington, DC 20549-1090

Re: Registration for Index-Linked Annuities; Amendments to Form N-4 for Index-Linked and Variable Annuities; File No. S7–16–23; Release No. 33-11250; 34-98624; IC-35028

Dear Ms. Countryman:

Gainbridge Life Insurance Company ("Gainbridge Life") and Delaware Life Insurance Company ("Delaware Life") submit the following letter in response to the Securities and Exchange Commission's ("Commission") proposed rule and form amendments for registered index-linked annuities ("RILAs") and variable annuities ("VAs") (the "Proposal" and "proposing Release").

In May 2023, Gainbridge Life began offering its OneUp™ RILA, registered on Form S-1 under the Securities Act of 1933 ("1933 Act") ("Form S-1"), through its affiliated Gainbridge direct-to-consumer, digital platform (www.gainbridge.io). The OneUp™ RILA currently offers three index-linked options, with terms that range from 90 days to six years, and a fixed interest strategy. OneUp™ RILA purchasers do not have a "bounded return" on the upside performance of the reference indices as this product does not apply cap rates, participation rates or otherwise limit upside performance. All of the OneUp™ RILA index-linked strategies reference either the S&P 500® Price Return Index or the S&P 500® Total Return Index. The principal underwriter voluntarily files retail sales literature for the OneUp™ RILA with the Financial Industry Regulatory Authority ("FINRA") for its review and comment. On April 28, 2023, the Commission granted permission under Rule 3-13 of Regulation S-X for Gainbridge Life and Delaware Life to file financial statements prepared in accordance with statutory accounting principles ("SAP financial statements"), in lieu of financial statements prepared in accordance with generally accepted accounting principles ("GAAP financial statements"), in registration statements filed for RILAs on Form S-1.

Gainbridge Life and Delaware Life are pleased with the Proposal and extend their gratitude to the Commission for proposing a simpler, more uniform approach to the registration and regulation of RILAs. We believe the Proposal fairly considers the needs of RILA issuers and investors by revising Form N-4 under the Investment Company Act of 1940 ("1940 Act") to encompass the registration of RILAs.

In particular, we note that the Proposal includes permission to incorporate SAP financial statements into the RILA registration statement for those issuers who are not otherwise required to prepare GAAP financial statements. We believe that permitting the use of SAP financial statements in these circumstances will facilitate entry into the RILA market for prospective issuers, thereby increasing RILA product development and benefiting investors by increasing the selection of competitive products available to them.

In addition, the proposed amendments to Form 24F-2 under the 1933 Act, which enables issuers to pay securities registration fees once annually based on net sales, will simplify the administration of RILA products. By permitting RILA issuers to follow the same registration fee requirements that VA issuers now follow, this part of the Proposal minimizes the risk that RILA issuers will find themselves inadvertently selling unregistered securities.

Finally, the use of the proposed Form N-4 for RILAs will provide investors with concise disclosures, which are specifically tailored for the needs of investors in registered annuity products. As revised, the proposed Form N-4 would require RILA prospectuses to include an Overview, Key Information Table, Fee Table, and reference index return sections for RILAs all of which will enable investors to readily compare RILA products to one another. There also are parallel disclosure requirements for VAs in the Form N-4. These disclosure requirements will also enable prospective investors to compare RILAs and VAs through consistent disclosure and the use of iXBRL.

Nevertheless, despite our overall support for the Proposal, we make two requests of the Commission. First, we request that the Commission reconsider and modify certain of the proposed revisions to Form N-4, as further described below. Second, we respectfully urge the Commission to adopt the advertising rules that currently apply to VAs so that they apply equally to RILAs. Please note that we also generally support the comment letters submitted to the Commission by the American Council of Life Insurers and the Committee of Annuity Insurers, especially regarding the proposed revisions to Form N-4.

Our specific comments are as follows:

I. RILAs Are Not Inherently More Complex than VAs; RILAs Do Not Inherently Pose Greater Risk or Warrant More Expansive Disclosure

Throughout its commentary to the proposing Release, the Commission expresses a view that RILAs are more complex and difficult to explain, and subject investors to greater risk, than VAs and therefore require different and more expansive disclosure. We respectfully disagree.

First, and in terms of complexity, a RILA's features and benefits are not inherently difficult to explain to an investor. The core feature of RILA products is the offer of one or more index-linked options based on the performance of a reference index. Many reference indices used in RILAs (such as the S&P 500®) are familiar to and generally understood in the marketplace by investors, are reasonably transparent, and can be tracked daily. While bespoke or more complex indices might require appropriate additional disclosure, it is our understanding that most RILAs do not reference such indices. Where additional disclosure is appropriate, the proposed Form N-4 will require such disclosures to enhance investors' understanding. We do not agree, however, that RILAs are inherently more complex than VAs or more difficult for investors to comprehend. Furthermore, the use of Form N-4 by RILA issuers will further provide additional transparency and help investors to understand the mechanics of how each product's crediting strategies will operate in an up or down market.

Additionally, a decision to invest in a RILA may be less risky for investors when compared to many other financial instruments, including VAs, exchange traded funds and stocks. Many RILAs provide downside protection that can limit, mitigate, or even fully eliminate the downside risk to the investor. The amount of market participation or upside performance is oftentimes directly related to the amount of downside risk the investor wishes to assume. In general, the credits offered to the investor are easily calculable and tied directly to the upside/downside protections elected by the investor, which are then applied to the index value during or at the end of the term in accordance with the investor's selected index-linked option(s). While there are some complex interim value calculations (for partial credits) in most RILAs, these are related to features that provide investors with liquidity for early withdrawal or surrender during the applicable term and are required to be disclosed in a formulaic and transparent manner that can be demonstrated through calculations and examples. Interim value calculations are therefore a positive feature of RILAs relative to other instruments, including structured notes.

We believe that RILAs features and benefits should be appropriately disclosed, like the features and benefits of VAs, along with their related costs and risks. Using proposed Form N-4, RILA issuers will be required to disclose all features of an index-linked option, such as applicable cap rates, participation rates, buffer rates, floor rates, and performance trigger rates in each case accompanied by illustrative examples in positive and negative scenarios. RILA issuers will also be required to prominently disclose all fees and charges, such as surrender charges and fees for optional living benefits, if any (we note, however, that most RILAs do not offer optional living benefit riders with additional fees, but instead provide simple downside protection over a specified time period). And it should not be difficult to describe, in plain English, a RILA's downside protection, limits on index gains (if any), length of the crediting term, and other material features, fees, and charges. Therefore, RILA issuers should not be required to make disclosures that are not required of VAs, such as maximum potential loss, as a percentage, that could result from a negative contract adjustment. We believe that the adoption of the proposed Form N-4 as the primary registration form for RILAs and VAs, will provide investors with appropriately comprehensive disclosure of the features and costs of these products, and that RILA registration statements on the new Form N-4 and will be more easily accessible, understandable, and useful than RILA registration statements on Form S-1.

II. Cap Rates and Participation Rates Are Not Sole Measures of Profitability

There appears to be a misunderstanding reflected in the proposing Release that the profitability of RILA contracts is dependent on or supported largely by the imposition of cap rates and participation rates on the index-linked option. Specifically, the misunderstanding relates to the role of cap rates and participation rates as part of the RILA issuer's analysis of what interest index-linked options it can comfortably offer in light of market conditions at any particular point in time. There is not a one-to-one correspondence between the performance of a reference index and the amount a RILA issuer can earn on an investment in order to support the index-linked options offered. And as commonly disclosed in RILA prospectuses, the RILA issuer does not invest in the underlying securities of the reference index. As a result, a RILA issuer does not apply cap rates or participation rates as a means of capturing for itself any increases in index value that would otherwise increase the amount of interest credited to investors in the absence of such cap rates or participation rates.

Rather, RILA issuers typically purchase derivative instruments such as futures and options which serve to hedge the insurer's general account portfolio investments while attempting to mirror or replicate the index performance. The RILA issuer's choice of hedging instruments takes into consideration a range of cap rates and participation rates, which generally have a positive correlation to the related hedges. In general, RILA issuers use a combination of the following pricing factors and design features in developing RILA index-linked options: cap rates, participation rates, buffer rates, floor rates, trigger performance rates, the costs associated with purchasing options or futures contracts, and the expected yield/return on the RILA issuer's portfolio investments. The difference between the effectiveness of the options or futures contracts acquired to hedge the performance of the reference index, plus the performance of the RILA issuer's other portfolio investments, on the one hand, and the RILA issuer's expenses, including distribution costs and the price of available options or futures contracts, on the other hand, determines the profit margin for the RILA issuer.

III. Cap Rates and Participation Rates are Not Fees

The Proposal also requires RILA issuers to characterize cap rates and participation rates as fees. We disagree with this characterization, and respectfully request that the Commission reconsider this proposed requirement. As described above, cap rates and participation rates are factors that contribute to the pricing of RILA contracts under certain market conditions but do not represent any fee paid by an investor or any fees paid to a RILA issuer. In contrast to mortality and expense risk charges, which are deducted from separate account assets under typical VAs, cap rates and participation rates are among the investment parameters that a RILA issuer can use to design index linked options. Their role as investment parameters is what distinguishes cap rates and participation rates from fees, such as VA mortality and expense risk charges, which are generally not imposed by RILAs and other types of charges that may be imposed under a RILA such as charges for early withdrawals or surrender of fees for optional living benefit riders, if any.

Cap rates and participation rates should therefore not be classified or characterized as fees, as traditionally recognized on Form N-4.

IV. Advertising Rules Applicable to VAs should be applicable to RILAs.

We believe that all RILA issuers should have access to the same advertising rules that apply to VAs. Through its proposed changes to Form N-4 and adoption of its use for RILA products, the

Commission has acknowledged the need for investors to be provided with disclosure that is straight-forward, not difficult to grasp, and standard across RILA, VA, and hybrid RILA/VA products. We support the standardization of disclosure that will enable investors to better understand and compare the features, costs, and risks of purchasing such products. We believe that investors will similarly benefit from standardizing the regulation of advertising and sales literature across RILA and VA products.

We focus on two regulations in particular. First, we believe that Rule 433 under the 1933 Act ("Rule 433") should be amended so that all RILA issuers have the ability to use a "free writing" prospectus (a "FWP"). Second, we believe that Rule 482 under the 1940 Act ("Rule 482"), which lays out advertising requirements for VAs as well as all other products registered under the 1940 Act, should be modified to apply to RILAs. We recognize the Commission's concerns about how to present performance information for RILAs without a current uniform standard for presenting such information and therefore propose that the Commission consider amending Rule 482 to apply to RILAs, excluding the provisions which relate to product performance.

Under the proposing Release, only certain RILA issuers will be able to make use of a FWP in accordance with Rule 433. These are the same subset of RILA issuers who can file their RILA registration statements on Form S-3 today. Footnote 356 to the proposing Release describes this as follows:

> "As a result, RILA sales literature, as "free writing" prospectuses, would continue to be subject to 17 CFR 230.164 and 17 CFR 230.433, as well as any other applicable rule that permits a communication notwithstanding the "gun jumping" provisions of the Securities Act."

A FWP is defined by Rule 405 under the 1933 Act as "any *written communication* (by the issuer) . . . that constitutes an offer to sell or a *solicitation* of an offer to buy the securities relating to a registered offering that is used after the registration statement in respect of the offering is filed . . . " [emphasis added].

As set forth in the Proposal, "eligible issuers" (who meet all the registrant requirements of Form S-3, such as filing all periodic filings under the Securities Exchange Act of 1934 (the "1934 Act"), such as Forms 10-K, 10-Q, and 8-K for at least previous twelve months) will continue to be able to deliver a FWP related to a RILA without delivery of a prospectus, while "ineligible issuers" (who do not meet these requirements) will be required to deliver a prospectus along with any FWP related to a RILA.

This dichotomy in prospectus delivery requirements under Rule 433, as set forth in the Proposal, would perpetuate an unfair distinction between those RILA issuers who also make filings under the 1934 Act versus those RILA issuers who do not. More specifically, RILA issuers who are eligible issuers could continue to advertise their RILAs broadly in media such as print and on television using FWPs that are not accompanied by a prospectus, whereas RILA issuers who are ineligible issuers would continue to be prohibited from using FWPs to advertise their RILAs in any medium that does not accommodate simultaneous prospectus delivery.

The rationale for the proposed difference in the prospectus delivery requirements applied to different RILA issuers, which is based exclusively on whether the RILA issuer has made certain filings under the 1934 Act, seems irrelevant once all RILA issuers are providing comparable disclosures in RILA registration statements that comply with the proposed Form N-4. Given the extensive disclosure that will be provided under the new Form N-4, we do not believe that limiting the availability of Rule 433 to only one type of RILA issuer will provide any additional protection for prospective RILA investors.

In contrast to Rule 433, Rule 482 is not currently available to any RILA issuer, as RILAs are not registered under the 1940 Act. Under Rule 482, VA issuers are permitted to advertise their VAs through advertising, sales material, and sales literature, such as brochure mailings, emails, news ads, website ads, and television or radio ads, all without delivery of a prospectus. As required by this Rule, VA issuers must provide advertising content that is explanatory and based on disclosure in the VA prospectus. However, VA issuers may also provide additional information in sales material and sales literature, subject to the antifraud provisions of the federal securities law, without the delivery of a prospectus.

In our view, any risks inherent to the marketing of RILA products would be adequately mitigated by extending to RILAs the regulatory framework currently in place for VAs. As addressed above, we do not believe that RILAs are more complex than VAs or other similar registered investment products. We believe that RILA sales literature, like VA sales literature, can be appropriately regulated and monitored under Rule 482, the purpose of which is to set forth certain advertising disclosure requirements for VA issuers and to ensure that investors are provided with information that is balanced and informative.

In the Proposal, the Commission proposes to extend the requirements of Rule 156 under the 1933 Act ("Rule 156"), which prohibits the use of materially misleading sales literature, to RILA issuers. In Note 1 to Rule 482(a), Rule 482 also refers registrants to Rule 156 for guidance on how to avoid making material misstatements in sales literature. Advertising, sales material, and sales literature that conform to the requirements of *both* Rule 482 and Rule 156 would provide appropriate disclosure to facilitate investor understanding, and thus should not need to be preceded or accompanied by a prospectus, regardless of whether the product is a RILA or a VA. Additionally, requiring that RILA sales literature be preceded or accompanied by a statutory or summary prospectus will not enhance the ability of the Commission or FINRA to regulate RILA issuers. In sum, existing restrictions on advertising make it impossible for RILA issuers who are ineligible issuers to advertise by certain means including but not limited to radio, television, newspaper, or magazine advertisements.

We believe that applying conflicting advertising rules to VAs and RILAs puts the sale of RILA products at a distinct competitive disadvantage without providing any additional protection to investors. The more restrictive advertising rules for RILAs effectively constitute a regulatory preference for VAs over RILAs, in stark opposition to what we understand to have been Congress's intent in passing the Registration for Index-Linked Annuities Act as part of the Consolidated Appropriations Act, 2023. Like Congress, we believe that investors will benefit from having more RILA products available in the marketplace and more information available about such products. A fair and consistent approach to marketing VA and RILA products, in the manner currently permitted for VAs, without additional restrictions on RILA issuers, would both promote competition and product choice and protect investors. Doing so would also be consistent with the Commission's approach to revising Form N-4, which standardizes disclosure requirements across RILAs and VAs.

V. Applicability of Certain Legends, Disclosures, and Permissible Rate Sheets

Finally, but with equal importance, we ask the Commission to confirm certain aspects of the proposed changes to Form N-4, such as the following:

- Please confirm that, if a legend is not applicable to a RILA product's features or product design, a RILA issuer will not be required to include such legends in a RILA registration statement under the proposed Form N-4;
- Please confirm that, if a required disclosure about a RILA feature is inapplicable to a specific RILA (if, for example, there are no caps on an index-linked option), a RILA issuer will not be required to include such disclosure in a RILA registration statement under the new N-4 Form; and
- Please confirm that RILAs may use rate sheets for certain rate changes under Accounting and Disclosure Information (ADI) 2018-05 issued by the Commission's Division of Investment Management.

Once again, we applaud the staff's efforts in putting together such a thorough and thoughtful Proposal. We are excited to be a part of these important changes and improvements for investors and the industry at large. Thank you for the opportunity to provide these comments. We look forward to the adoption of the final rule and form amendments for RILAs and VAs.

Respectfully submitted,

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